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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-14-0344

Carlos Benard Singleton

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-10-4451.70)

KELLUM, Judge.

The appellant, Carlos Benard Singleton, appeals from the circuit court's revocation of his probation. On February 29, 2011, Singleton pleaded guilty to attempted sexual abuse of a child less than 12 years old, a violation of §§ 13A-4-2 and

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13A-6-69.1, Ala. Code 1975. The circuit court sentenced Singleton to 15 years' imprisonment; the sentence was split, and he was ordered to serve 1 year in prison followed by 5 years' supervised probation. The circuit court ordered Singleton to pay \$50 to the crime victims compensation fund and court costs.

On September 26, 2014, Singleton's probation officer filed a delinquency report alleging that Singleton had violated the terms and conditions of his probation by testing positive for cocaine in June 2014, by failing to complete drug testing when ordered, by failing to report, by failing to participate in a scheduled "maintenance polygraph," and by failing to notify his probation officer of a change of address.¹ (C. 21.)

The circuit court conducted a probation-revocation hearing on November 6, 2014. At the hearing, Singleton's probation officer, Laura Vandam, testified that Singleton tested positive for cocaine on June 30, 2014. According to Vandam, Singleton also failed to report for random drug

¹As a condition of his probation, Singleton was ordered to participate in a "specialized sex offender treatment program that utilizes the clinical polygraph technique as part of the treatment guidelines for sex offenders." (C. 54.)

screens in July 2014 and September 2014. Vandam testified that Singleton, who was homeless, failed to report weekly as required by law, refused to complete a scheduled "maintenance polygraph" as required by the Sex Offender Management Program, and failed to report a change to his address. Singleton testified that he was in poor health and had recently been hospitalized. Singleton admitted that he had used cocaine once while on probation. Singleton stated that he had stayed with his mother, who was also in poor health, for a week and a half to help her but that he did not inform his probation officer of his location. After considering the evidence presented at the revocation hearing, the circuit court entered an order on November 6, 2014, in which it revoked Singleton's probation and ordered Singleton to serve the balance of his sentence in the custody of the Alabama Department of Corrections. This appeal followed.

Singleton contends that the 15-year sentence originally imposed by the circuit court is illegal because, he argues, the sentence exceeded the maximum sentence allowed by law and grants an unauthorized term of probation under the law. Citing this Court's decision in Enfinger v. State, 123 So. 3d 535

(Ala. Crim. App. 2012), Singleton maintains that the circuit court's revocation of his probation is due to be reversed based on the illegality of the sentence.²

Initially, we note that, although the legality of Singleton's sentence was not first argued in the circuit court, we have held that "[m]atters concerning unauthorized sentences are jurisdictional." Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994). Thus, this Court may take notice of an illegal sentence at any time. See, e.g., McCall v. State, 794 So. 2d 1243 (Ala. Crim. App. 2000); Pender v. State, 740 So. 2d 482, 484 (Ala. Crim. App. 1999).

The record indicates that Singleton pleaded guilty to attempted sexual abuse of a child less than 12 years old and was sentenced to 15 years' imprisonment. The 15-year sentence was split pursuant to the Split Sentence Act, § 15-18-8, Ala. Code 1975, and Singleton was ordered to serve 1 year in prison followed by 5 years' supervised probation.

The crime of sexual abuse of a child less than 12 years old is a Class B felony. See § 13A-6-69.1(b), Ala. Code 1975.

²For purposes of appellate review, we have combined the first and second issues raised by Singleton in his brief on appeal.

An attempt of a Class B felony is punishable as a Class C felony, see § 13A-4-2(d)(3), Ala. Code 1975, and a person convicted of a Class C felony may be sentenced to "not more than 10 years or less than 1 year and 1 day" in prison. § 13A-5-6(a)(3), Ala. Code 1975. Section 13A-5-2(d), Ala. Code 1975, provides:

"Every person convicted of a felony, misdemeanor, or violation, except for the commission of a criminal sex offense involving a child as defined in Section 15-20-21(5), may be placed on probation as authorized by law."

Section 15-20-21(5), Ala. Code 1975, defines a "criminal sex offense involving a child" as "a conviction for any criminal sex offense in which the victim was a child under the age of 12 and any offense involving child pornography."³ The Split

³Section 15-20-21(5) was repealed by Act No. 2011-940, § 49, effective July 1, 2011, and was replaced by § 15-20A-48(a), which provides:

"For the purposes of Sections 13A-5-2, 13A-5-6, 14-9-41, 15-18-8, 15-22-27.3, or any other section of the Code of Alabama 1975, a criminal sex offense involving a child shall mean a conviction for any sex offense in which the victim was a child under the age of 12 or any offense involving child pornography."

Because the law in effect at the time of the commission of the offense controls, § 15-20-21(5) applies in the instant case. See Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App.

Sentence Act prohibits splitting the sentence of an offender convicted of "a criminal sex offense involving a child as defined in Section 15-20-21(5)." § 15-18-8(a), Ala. Code 1975.

Further, under the Split Sentence Act, "[p]robation may not be granted for a criminal sex offense involving a child as defined in Section 15-20-21(5), which constitutes a Class A or B felony." § 15-18-8(b), Ala. Code 1975.

In this case, the record contains a pro se motion filed by Singleton in which he acknowledges that he was sentenced as a habitual felony offender. Even with one prior felony conviction, Singleton -- who pleaded guilty to a Class C felony -- could be sentenced to not more than 20 years or less than 2 years. See §§ 13A-5-9(a)(1) and 13A-5-6(a)(2), Ala. Code 1975. Therefore, contrary to Singleton's contention on appeal, the circuit court's 15-year sentence did not exceed the maximum authorized by law. The circuit court's imposition of a term of probation, however, was illegal.

In Holley v. State, [Ms. CR-12-2023, October 3, 2014] ____ So. 3d ____ (Ala. Crim. App. 2014), Holley pleaded guilty to

1990) ("A defendant's sentence is determined by the law in effect at the time of the commission of the offense.").

first-degree sexual abuse of a child under the age of 12, a violation of § 13A-6-66(a)(3), Ala. Code 1975.⁴ The trial court sentenced Holley to 10 years' imprisonment; that sentence was split, and Holley was ordered to serve 3 years' imprisonment followed by 5 years' supervised probation. Holley subsequently violated the terms and conditions of his probation, and the trial court revoked Holley's probation. On appeal, this Court considered the legality of Holley's split sentence in light of his conviction for a criminal sex offense involving a child as defined in § 15-20-21(5) and reversed the judgment of the trial court, stating:

"In Enfinger v. State, 123 So. 3d 535 (Ala. Crim. App. 2012), this Court recently held that a trial court has no authority to revoke probation that was imposed as part of an illegal sentence.

"'[W]e have held that when the circuit court does not have the authority to split a sentence under the Split-Sentence Act, § 15-18-8, Ala. Code 1975, 'the manner in which the [circuit] court split the sentence is illegal [,]' Austin v. State, 864 So. 2d 1115, 1118 (Ala. Crim. App. 2003), and that '[m]atters concerning unauthorized sentences are jurisdictional.'"

⁴Section 13A-6-66, Ala. Code 1975, was amended effective July 1, 2006, to delete subsection (a)(3); before the amendment, the offense described in subsection (a)(3) was categorized as a Class C felony.

Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994).'

"Enfinger v. State, 123 So. 3d at 537. Because Holley committed the crime of first-degree sexual abuse of a child under the age of 12 on December 17, 2005, the sentence imposed was an illegal sentence because it violated the Split Sentence Act that had become the law on October 1, 2005. Moreover, pursuant to Enfinger, a subsequent probation revocation order in such a case has no effect. Enfinger v. State, 123 So. 3d at 538 ('Because the circuit court had no authority to split Enfinger's sentence or to impose a term of probation, it likewise had no authority to conduct a probation-revocation hearing and revoke Enfinger's probation....'); see also Mewborn v. State, [Ms. CR-12-2007, June 13, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014).

"This case must be remanded for the circuit court to conduct a sentencing hearing and to resentence Holley. To avoid a violation of Holley's rights under the Equal Protection Clause of the 14th Amendment to the United States Constitution, however, the circuit court may not impose a sentence greater than the original sentence of 10 years' imprisonment. Mewborn v. State, ___ So. 3d at ___ n. 1 ('We note that in resentencing Mewborn the circuit court may not impose a sentence greater than [the original sentence] because doing so "would be a violation of [Mewborn's] rights under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States." Ex parte Tice, 475 So. 2d 590, 592 (Ala. 1984) (citing Rice v. Simpson, 274 F.Supp. 116 (M.D. Ala. 1967))).'

"The record does not indicate whether Holley's guilty plea or sentence was the result of a plea bargain. 'Therefore, it is impossible for this Court to determine whether resentencing [Holley] will affect the voluntariness of his plea.' Austin v.

State, 864 So. 2d 1115, 1119 (Ala. Crim. App. 2003).
'"If the [suspended] sentence was a term of
[Holley's] 'plea bargain,' and, if he moves to
withdraw his guilty plea, the circuit court should
conduct a hearing to determine whether withdrawal of
the plea is necessary to correct a manifest
injustice. See Rule 14.4(e), Ala. R. Crim. P."
Enfinger [v. State], 123 So. 3d [535,] 539 [(Ala.
Crim. App. 2012)].' Mewborn, ___ So. 3d at ___.

"Accordingly, we reverse the judgment sentencing
Holley to 10 years in prison and purporting to split
that sentence, and we reverse the revocation of
probation. We remand the cause to the circuit court
for proceedings consistent with this opinion. In
addition to resentencing Holley, the circuit court
may address any resulting issues regarding the
voluntariness of Holley's plea."

Holley, ___ So. 3d at ___.

In the instant case, as in Holley, Singleton pleaded
guilty to a criminal sex offense involving a child under 12
years of age; that offense was a Class C felony. At the time
Singleton committed the offense, the law prohibited the
circuit court from imposing a term of probation for offenders
convicted of a criminal sex offense involving a child less
than 12 years old. See § 13A-5-2(d), Ala. Code 1975. Because
the sentence imposed by the circuit court was illegal, the
circuit court was without jurisdiction to revoke Singleton's
probation pursuant to this Court's holding in Enfinger and the
circuit court's order purporting to revoke Singleton's

probation was without effect. See Scott v. State, 148 So. 3d 458 (Ala. Crim. App. 2013). As was the case in Holley, the record does not indicate whether Singleton's guilty plea or sentence was the result of a plea bargain, and this Court is unable to determine whether resentencing Singleton will affect the voluntariness of his plea. Holley, ___ So. 3d at ___ (quoting Austin v. State, 864 So. 2d 1115, 1119 (Ala. Crim. App. 2003)). "If the [suspended] sentence was a term of [Singleton's] 'plea bargain,' and, if he moves to withdraw his guilty plea, the circuit court should conduct a hearing to determine whether withdrawal of the plea is necessary to correct a manifest injustice. See Rule 14.4(e), Ala. R. Crim. P." Holley, ___ So. 3d at ___ (citations omitted).

Accordingly, the judgment of the circuit court sentencing Singleton to 15 years' imprisonment and purporting to split that sentence and to place Singleton on probation is reversed, and this case is remanded to the circuit court for proceedings consistent with this opinion, including resentencing and addressing any subsequent issues that might arise relating to

the voluntariness of Singleton's plea.⁵ The circuit court shall take all necessary action to ensure due return to this Court at the earliest possible time but no later than 42 days after the release of this opinion. The return to remand shall include a detailed order and a transcript of the proceedings conducted on remand.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Welch, Burke, and Joiner, JJ., concur. Windom, P.J., dissents.

⁵Because we are reversing the judgment of the circuit court based on an illegal sentence, we need not address Singleton's remaining issue on appeal, namely, that the circuit court erred in revoking his probation because "there were other measures short of confinement that would have adequately protected the community from further criminal activity ... and avoided depreciating the seriousness of the violation." (Singleton's brief, p. 16.)